

# **EXHIBIT A**



1 Q. And this was written by Mr. Fasciani,  
2 reviewed by Mr. Deschenes, and the allegations were  
3 reviewed by you --

4 A. That is correct.

5 Q. -- prior to the delivery of this letter to  
6 Mr. Rodio, right?

7 A. Correct.

8 Q. What did you mean when you said he failed  
9 to maintain the everyday lowest price, he failed --  
10 were you urging him to sell cigarettes at a certain  
11 price or not?

12 A. The everyday low price program when  
13 presented to the retailer, which it's the  
14 retailer's option to accept or not, states that RJ  
15 Reynolds' brand -- and I have to refer here --  
16 which would be Monarch, there can be no brand in  
17 the store sold to the consumer for a lower price  
18 than Monarch.

19 Q. If it's the decision of the retailer, then  
20 why do you put the burden on your sales rep to  
21 maintain the lowest price?

22 A. Because the sales rep -- by signing the  
23 retailer up on this program, the retailer has to  
24 adhere to the requirements of the program; and the

1 sales rep's job is ensure that the retailer adheres  
2 to the contractual requirements that he signed off  
3 on.

4 Q. Which is to sell your cigarettes below  
5 state minimum?

6 A. There is nothing here in this sentence  
7 that you read to me that speaks anything to state  
8 minimum.

9 Q. Let's go back and read the rest of this;  
10 maybe that will help: "Wave, competitive product,  
11 cigarettes retail for \$3.52 per pack while RJRT's  
12 Monarch retail for \$3.62 per pack."

13 A. Okay.

14 Q. You were blaming Rodio and firing him for  
15 not selling your Monarch brand at 3.52 or below.  
16 Isn't that what this plain English means?

17 A. This is saying that Monarch was not the  
18 everyday-low-price brand in the store. The  
19 retailer signed up for a program that would require  
20 Monarch to be the everyday-low-price brand,  
21 regardless of what -- the retailer establishes the  
22 price.

23 Q. Regardless of what the state minimum was,  
24 yes or no.

1           A.    I don't know what the retailer did  
2           regarding state minimum. I do not know what the  
3           state minimum price was at that time.

4           Q.    Shouldn't you have known, Mr. Kane, with  
5           all your experience and long standing with this  
6           company that the price, minimum price was 4.01 and  
7           you are urging this guy to sell it below 3.62?

8           A.    No, I would not; because I do not know  
9           that the price that you are referring to, 4.01, was  
10          in fact the state minimum at the time.

11          Q.    You don't think the Attorney General has  
12          the state minimums for every year?

13          A.    I would assume they would.

14          Q.    Did you ever check on that to see what the  
15          minimum was in 2002?

16          A.    Was it part of my role to check what the  
17          state minimum price was with the Attorney General?

18          Q.    You were firing Mr. Rodio for failing to  
19          sell Monarch below 3.62 when the minimum price set  
20          by the state was 4.01. Isn't that what you were  
21          doing here in your own words, the words of your  
22          company?

23                MR. LOFTIS: Objection to the form of the  
24          question.

1 Q. You can answer it. The minimum price for  
2 Monarch was 4.01 in October of '02, and you are  
3 firing this guy for not selling it at 3.52 or  
4 below. This says that in plain English. Doesn't  
5 that tell you that you were firing him because he  
6 was selling cigarettes -- he failed to sell  
7 cigarettes substantially below the state minimum?

8 A. Is that a question?

9 Q. Yes, sir, it is.

10 A. He does not sell -- Mr. Rodio does not  
11 sell the cigarettes. You said he failed to sell  
12 the cigarettes.

13 Q. Failed to maintain the price. This is  
14 your own words, "failed to maintain". What did you  
15 mean by that, that he failed to maintain? He  
16 failed to enforce the contract that requires the  
17 retailer to sell below 3.52; is that what you  
18 meant?

19 MR. LOFTIS: Objection. That's not what  
20 the contract says.

21 MR. SAHADY: Let him tell me what the  
22 contract says, if I'm wrong.

23 A. The contract states that Monarch, the  
24 brand that we are talking about, should be the

1 lowest or at parity with the lowest brand in the  
2 store.

3 Q. And it didn't matter to Richard Kane  
4 whether this price was below state minimum or not?

5 A. The EDLP contract does not speak to state  
6 minimum.

7 Q. Of course, you are not going to say that  
8 openly.

9 MR. LOFTIS: Whoa --

10 Q. I know it didn't say that. That's not  
11 what I said. You are a very brilliant man, Mr.  
12 Kane; so please listen to the question and answer  
13 it. You either knew or didn't know the minimum  
14 price for Monarch in 2002, in October. If you knew  
15 it, tell me. If you didn't know it, you should  
16 have known it.

17 MR. LOFTIS: That's not a question.

18 MR. SAHADY: But I'm just prefacing --

19 MR. LOFTIS: Lecturing the witness.

20 MR. SAHADY: Exactly. Educating him so we  
21 can get an answer from him.

22 Q. Did you know the minimum price for Monarch  
23 in October of '02?

24 A. I do not know at this time what the state

1 minimum price of Monarch was in '02.

2 Q. At this time, you don't know it. I can  
3 accept that, Mr. Kane. But did you know it in  
4 October of '02?

5 A. I do not recall if I did.

6 Q. Should you have known it?

7 A. Not necessarily.

8 Q. Who should have known it, Fasciani?

9 A. The retailer should know it.

10 Q. And you had -- you didn't care whether it  
11 was below the state minimum or not, that was the  
12 retailer's problem. Is that what you're saying?

13 A. Could you rephrase the question?

14 Q. I'm failing to understand the meaning of  
15 your language in this termination letter, "you  
16 failed to execute the everyday low price, EDLP,  
17 contract requirements in this account by not  
18 placing signage and failing to maintain the  
19 everyday lowest price for Monarch".

20 You are telling this guy, this grunt in  
21 the field, that he failed to maintain the everyday  
22 lowest price when that lowest price would bring  
23 your product substantially below the state minimum.  
24 Is that what you're telling him here or am I



1 misreading this?

2 A. I don't see anything here that refers to  
3 state minimum, so I can't answer that question.

4 Q. But you are saying that you would have  
5 known the state minimum back in '02?

6 MR. LOFTIS: I don't believe that's what  
7 he said.

8 A. I said I wouldn't necessarily have known  
9 that. Could you read the answer to my question? I  
10 don't think that's my exact words. I mean, my  
11 answer to your question.

12 Q. So you want to leave it that you didn't  
13 know what the minimum was in '02, the state minimum  
14 price for Monarch? Is that how you want to leave  
15 your testimony?

16 A. Is the question, did I know the exact  
17 state minimum price of Monarch when this was  
18 written?

19 Q. Do you want to leave it at what you have  
20 said to us so far?

21 A. Could somebody read what I said before I  
22 answer that question?

23 Q. Let me finish my question. I'll ask you a  
24 whole new question. I'll start it from scratch.

1                   You maintained some overview of the  
2                   minimum pricing of cigarettes in this state, did  
3                   you not?

4                   A.    What do you mean by "overview"?

5                   Q.    You became familiar with what the minimum  
6                   pricing was for Monarch, for Camels, for any other  
7                   brand that was sold by your competitors as well?

8                   A.    I was aware that there was state minimum  
9                   pricing.

10                  Q.    You were aware of that. Did you come to  
11                  know at least in a superficial way what these  
12                  prices were for different products by different  
13                  companies including your own?

14                  A.    At that point in time, in making retail  
15                  calls, I was probably made familiar with what the  
16                  various state minimum pricing, price points were.

17                  Q.    You were watching your competition here,  
18                  Wave -- your company was, was it not?

19                  A.    We were watching Monarch to ensure that  
20                  Monarch was the everyday low price brand in the  
21                  store.

22                  Q.    But you were astute enough and careful  
23                  enough to watch what your competitor is doing, that  
24                  you say the Wave product was for 3.52; but you were

1 not observant enough to know what the state minimum  
2 was?

3 A. First of all, I didn't write this  
4 document; so the observance of the difference  
5 between 3.62 for Monarch and 3.52 by Wave would  
6 have been made by Mr. Fasciani.

7 Q. But he's your subordinate and you reviewed  
8 this with him you said, correct?

9 A. Yes.

10 Q. And you put the onus, the burden here to  
11 maintain the everyday low price on Mr. Rodio, your  
12 employee? Is this what this language says, "you  
13 failed to maintain the everyday lowest price"?

14 A. The language states exactly what it  
15 states.

16 Q. Exactly what I just read. And it means to  
17 you something different than the English language  
18 means to everybody else?

19 MR. LOFTIS: Objection to the form of the  
20 question.

21 Q. When you say "you failed to maintain", are  
22 you saying to him he should maintain the price?  
23 When you say to someone, "you failed to do this",  
24 it implies that he had a duty to do it, he had an

1 obligation to do it. His obligation, the way I  
2 read it here -- And if it's different, you tell me.  
3 His obligation was to make sure that the Monarch  
4 price was below or at parity with 3.52, which would  
5 have been making the product substantially below  
6 the state minimum of 4.01?

7 A. I can't speak to the state minimum  
8 pricing.

9 Q. Why, because you don't know it now or  
10 because you didn't know it then?

11 A. I don't know it now. I don't recall what  
12 it was, and the document that you put in front of  
13 me means nothing to me.

14 Q. You don't recall what it was?

15 A. I know that there was state minimum  
16 pricing in effect. It changes all the time; so I  
17 don't recall everytime there's a manufacturer's  
18 price increase, a state excise tax increase. The  
19 state changes its formula. The state minimum  
20 changes.

21 Q. Yes, I agree with that totally, Mr. Kane.  
22 You are the manufacturer, right?

23 A. RJ Reynolds Tobacco is the manufacturer.

24 Q. When I say "you", I don't mean you

1 personally. So the manufacturer has a great impact  
2 upon the minimum price. You just told us the  
3 manufacturer and other factors go into it, correct?

4 A. The manufacturer determines the list price  
5 of the cigarettes to the wholesaler.

6 Q. Which determines eventually the sale of  
7 the product to the consumer?

8 A. The state would determine the formula.

9 Q. And you are supposed to adhere to that  
10 formula?

11 A. The retailer is supposed to adhere to  
12 state minimum pricing.

13 Q. And you were aware of what the state  
14 minimum pricing was in October of '02?

15 A. I said I was not aware. I was aware there  
16 was state minimum pricing, not the actual state  
17 minimum price.

18 Q. So you are telling us now that you knew  
19 that there was out there somewhere state minimum  
20 pricing, but you didn't know what the state minimum  
21 price for Monarch was. Is that what you're saying?

22 A. At this particular point in time on the  
23 date that Mr. Rodio made this call, I don't know  
24 what the absolute state minimum price was.

1 Q. Mr. Rodio made the call. What call?

2 A. Isn't this talking about Swidey's Variety,  
3 which was one of his calls?

4 Q. By call you mean --

5 A. I mean retail establishment that --

6 Q. I misunderstood. I take it you subscribe  
7 to this letter and what's in it, otherwise you  
8 would have vetoed it, certain parts of it?

9 A. Could you clarify what you mean by  
10 "subscribe"?

11 Q. Subscribe means you agree with it, you  
12 bless it.

13 A. I would agree with the contents of the  
14 letter overall, yes.

15 Q. Now, in establishing -- for the state to  
16 establish its minimum pricing for a certain brand,  
17 it relies on reporting to it by the manufacturer  
18 and the wholesaler?

19 A. By the manufacturer, yes.

20 Q. But not by the wholesaler?

21 A. I'm not sure about that. My understanding  
22 is that the manufacturers give the state their list  
23 price. From that point forward, the state applies  
24 a formula, a state minimum markup from the

1 wholesaler to the retailer and then from the  
2 retailer to the consumer.

3 Q. The state minimum pricing has a dual  
4 purpose, I think. What I think isn't important;  
5 but -- first, to ensure the proper revenue goes to  
6 the state; and second, to prevent predatory  
7 practices by the competitors in the tobacco  
8 industry. Is that your understanding as well?

9 MR. LOFTIS: I would object to the form of  
10 the question. That's calling for a legal  
11 conclusion that he would have no basis -- you are  
12 asking him what the intent of the law is. I  
13 couldn't even answer that question.

14 MR. SAHADY: Neither could I.

15 MR. LOFTIS: Then why ask the witness.

16 A. May I take a break to get water?

17 (Break.)

18 Q. So Mr. Kane then --

19 A. Should I put this away then? Is this  
20 supposed to stay with me?

21 MR. LOFTIS: I was going to say the only  
22 thing that I would ask is that we -- just so we  
23 have a very clean copy, nothing written on it.

24 MR. SAHADY: And we can introduce this as

1 Exhibit 2.

2 MR. LOFTIS: You can mark it as Exhibit 2  
3 I don't think it's ever been authenticated. I  
4 don't know what it is either.

5 MR. SAHADY: For identification.

6 (Marked for identification, Exhibit 2,  
7 List of Prices.)

8 Q. So the state, as we were saying, then  
9 relies on the -- I'm quoting, by the various  
10 manufacturers to wit in order to set the minimum  
11 price?

12 A. That would be my assumption. I have never  
13 seen correspondence from RJ Reynolds to the state,  
14 but I would assume that that is how the state  
15 establishes its state minimum pricing. I'm not  
16 involved in that process.

17 Q. And the state minimum pricing varies from  
18 time to time?

19 A. That is correct.

20 Q. And it would be important to Phillip  
21 Morris or to RJR to maintain either the lowest  
22 price or price at parity with other competitors in  
23 a given area?

24 A. I can't speak to Phillip Morris.



1 Q. To you, RJR?

2 A. Regarding our everyday low price plan,  
3 that would be correct.

4 Q. So you want to stay in competition with  
5 your competitors, with Phillip Morris, let's say,  
6 if they are your primary competitor?

7 A. I really don't know how to answer that  
8 question.

9 Q. If you sold Monarch at a higher price than  
10 your competitor, say, Wave -- who makes Wave, by  
11 the way, do you know?

12 A. I do not know.

13 Q. If Monarch is consistently sold below  
14 Wave, this would hurt the sales of RJR; if Monarch  
15 is sold consistently above Wave in price there goes  
16 market share?

17 A. Potentially.

18 Q. So the incentive is to maintain Monarch at  
19 parity with or below Wave?

20 A. In that particular example, that would be  
21 correct.

22 Q. And in order to do that, you have created  
23 the EDLP program?

24 A. Not in particular relative to Wave; just

1 to be the everyday-low-price brand in a particular  
2 store.

3 Q. And regardless of what the state minimum  
4 prices would be at that time for that brand? Yes,  
5 that's a question, sir.

6 A. State minimum pricing is something for the  
7 retailer to adhere to.

8 Q. Why do you then say to your sales rep that  
9 he failed to maintain that price if the price is  
10 set by the wholesaler and the retailer?

11 A. Whatever the established price is in the  
12 store by the retailer, we want to have our brand be  
13 equal to or lower than any other brand in the  
14 store. If the retailer decides to charge a hundred  
15 dollars for a pack of cigarettes and that's the  
16 lowest price, we want to be at a hundred dollars.  
17 They determine that price.

18 Q. Regardless of whether that hundred dollars  
19 is above or below the state minimum?

20 A. The state minimum is -- it's my  
21 understanding that the retailer has to be in  
22 accordance with state minimum.

23 Q. That's not what I'm asking, Mr. Kane. You  
24 have no regard for what the state minimum is as

1 long as the price is established by the retailer.

2 Is that what you're saying?

3 A. It is not my role to get involved in any  
4 state minimum pricing discussion with a retailer.

5 Q. So you're indifferent as to what the state  
6 minimum is and you want to sell your cigarettes at  
7 that lowest price in the store regardless of  
8 whether it is within the state minimum or not?

9 A. I can't answer that.

10 Q. Of course. Thank you. I'll be asking you  
11 about that in the future. That's it.

12 MR. LOFTIS: Let me take a break. I may  
13 or may not have questions.

14 MR. SAHADY: Sure. Whatever you want.

15 (Break.)

16 MR. LOFTIS: We have no questions.

17 (Deposition concluded at 3:05 p.m.)  
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